Tan Sri Dato' Prof Dr Lim Kok Wing & Anor v ATSA Architects Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO 12BNCVC-31–04 OF 2015
MOHD FIRUZ JC
26 SEPTEMBER 2016

Contract — Payment for work done — Claim for balance due for work done — Respondent claimed balance of its fees as architect for appellants' project — Whether respondent correct when calculated fees based on estimated construction costs and not final contract sum — Whether respondent discharged their burden of proof in proving their claim

Evidence — Burden of proof — Discharge of — Respondent claimed balance of its fees as architect for appellants' project — Whether respondent discharged their burden of proof in proving their claim

The appellants desired to construct and complete a bungalow ('the project') in Sepang, Selangor and had since appointed the respondent as the project architect. The total amount for the respondent's services as the project architect was RM921,730.84, nevertheless, the appellants had only paid RM200,000 and refused to pay the balance of the respondent's fees. Consequently, the respondent commenced an action against the appellants and claimed for balance of its fees amounting to RM721,730.84. In proving its claim, the respondent relied upon the evidence of its sole witness ('PW1'), its letter to the first appellant dated 4 June 2008 and also invoice dated 13 October 2009. The trial judge found in favour of the respondent, hence the present appeal. The appellants submitted that the respondent had failed to discharge their burden of proof in proving that they were entitled to the sum of RM721,730.84 under the purported invoice dated 13 October 2009. It was further submitted that the fees claimed by the respondent was calculated based on an estimated construction cost and not the final contract sum and was therefore excessive and inflated.

Held, allowing the appeal with costs:

(1) The evidence adduced by the respondent to prove their claim of RM721,730.84 was lacking. The invoices on which the respondent relied to prove their claim was never referred to by him through PW1 at the trial. In view of the defendant's denial on the invoices as stated in para 12 of the amended defence and such was not a matter agreed upon

by both parties, it was incumbent for the respondent to prove that the invoices were issued to the appellants. Without the invoices, the respondent's case was defective. Further, there was no evidence adduced to support the respondent's claim that the amount in the invoice and in the letter of demand was the final construction sum. Without the invoices and evidence to support the respondent's claim of RM721,730.84, the respondent's case was flawed with major defects (see para 38).

(2) As a matter of practice and law, the final account of a particular project is the best way to ascertain the final construction cost of the project. In the present appeal, there was no final account. No reasons for such were offered at the trial as the respondent was purely relying on their letter dated 4 June 2008 and the invoice. Although the respondent did submit that the reasons for there being no final accounts ie the refusal of the first appellant to sign the same, such contention was never pleaded nor raised at the court below (see para 41).

[Bahasa Malaysia summary

Perayu-perayu ingin membina dan menyiapkan banglo ('projek tersebut') di Sepang, Selangor dan telah melantik responden sebagai arkitek projek. Jumlah keseluruhan khidmat responden sebagai arkitek projek adalah RM921,730.84, walau bagaimanapun, perayu-perayu hanya membayar RM200,000 dan menolak daripada membayar baki fi responden. Akibatnya, responden memulakan tindakan terhadap perayu-perayu dan menuntut baki fi berjumlah RM721,730.84. Dalam membuktikan tuntutannya, responden bergantung ke atas keterangan satu-satu saksinya ('PW1'), suratnya kepada perayu pertama bertarikh 4 Jun 2008 dan juga invois bertarikh 13 Oktober 2009. Hakim perbicaraan memutuskan memihak responden, maka rayuan ini. Perayu-perayu berhujah bahawa responden telah gagal untuk melepaskan beban pembuktian mereka bahawa mereka berhak kepada jumlah RM721,730.84 di bawah invois yang dimaksudkan bertarikh 13 Oktober 2009. Ia selanjutnya dihujahkan bahawa fi yang dituntut oleh responden dikira berdasarkan atas kos pembinaan yang dianggarkan dan bukan jumlah terakhir dan oleh itu adalah berlebihan dan melambung tinggi.

Diputuskan, membenarkan rayuan dengan kos:

(1) Keterangan yang dikemukakan oleh responden untuk membuktikan tuntutan mereka sebanyak RM721,730.84 adalah tidak ada. Invois-invois yang mana digunakan oleh responden untuk membuktikan tuntutan mereka tidak pernah dirujuk olehnya melalui PW1 semasa perbicaraan. Mengambil kira penafian defendan ke atas invois-invois yang dinyatakan di perenggan 12 pembelaan yang dipinda dan ia bukan perkara yang dipersetujui oleh kedua-dua pihak, ia adalah wajib ke atas responden untuk membuktikan invois-invois dikeluarkan kepada

perayu-perayu. Tanpa invois-invois tersebut, kes responden adalah cacat. Selanjutnya, tidak terdapat keterangan untuk dikemukakan untuk menyokong tuntutan responden bahawa jumlah di dalam invois dan surat tuntutan adalah jumlah pembinaan yang terakhir. Tanpa invois-invois tersebut dan keterangan untuk menyokong tuntutan responden sebanyak RM721,730.84, kes responden adalah cacat dengan kecacatan yang serius (lihat perenggan 38).

(2) Sebagai amalan dan undang-undang, akaun terakhir projek tertentu adalah cara terbaik untuk memastikan kos pembinaan terakhir projek tersebut. Dalam rayuan ini, tidak terdapat akaun terakhir. Tiada alasan untuk sedemikian diberikan di perbicaraan kerana responden adalah semata-mata bergantung ke atas surat mereka bertarikh 4 Jun 2008 dan invois. Walaupun responden juga telah memasukkan alasan-alasan kerana tidak mempunyai akaun terakhir iaitu penolakan responden pertama untuk menandatanganinya, hujahan sedekimian tidak pernah diplidkan atau dibangkitkan di Mahkamah Tinggi (lihat perenggan 41).]

Notes

For a case on claim for balance due for work done, see 3(4) *Mallal's Digest* (5th Ed, 2015) at para 6288.

For cases on discharge of burden of proof, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) at paras 809–809.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

Johari bin Khalid & Anor v Mohamed Zamri bin Khalid & Anor [1985] 1 MLJ 142, FC (refd)

Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145, FC (refd)

Selvaduray v Chinniah [1939] 1 MLJ 253 (refd)

Tay Kheng Hong v Heap Moh Steamship Co Ltd [1964] 1 MLJ 87, PC (refd)

Legislation referred to

Architects (Scale of Minimum Fees) Rules 1986 (repealed by Architects (Scale of Minimum Fees) Rules 2010

Architects (Scale of Minimum Fees) Rule 2010

Architects Act 1967

Architect Rules 1996

Evidence Act 1950 s 101

Lye Wing Voi (Yap Hsu-Lyn with him) (WV Lye & Partners) for the appellants.

Lim Hock Lee Edwin (Masturina bt Mohamad Rodzi with him) (Edwin Lim & Suren) for the respondent.

Mohd Firuz JC:

[1] The appeal before me arose from the decision of the sessions court judge ('the trial judge') dated 6 April 2015 at the conclusion of a full trial before her, whereby the respondent's claim for balance of the architect's fees was allowed against both the appellants who were found to be jointly liable.

[2] For purposes of convenience the parties in this present appeal, will be referred to in their original capacity at the trial namely as the plaintiff and the defendants.

BRIEF FACTS

[3] The plaintiff is an architect firm having their address at No 45, Jalan Tun Mohd Fuad 3, Taman Tun Dr Ismail, 60000 Kuala Lumpur.

[4] The first defendant is an individual and the director and shareholder of the second defendant.

[5] The second defendant is the registered proprietor of the lands held under title PT38002, PT38004 all in Mukim Dengkil, Daerah Sepang, Selangor Darul Ehsan. The second defendant had desired to construct and complete a bungalow known as 'Cadangan Pembinaan Kediaman di Aras PT98002, PT38003 dan PT38004 Seluas 1.26 Ekar, Flagship Village II, di atas Fasa 1B, Zone Flagship Cyberjaya, Mukim Dengkil, Daerah Sepang, Selangor Darul Ehsan' ('the project').

[6] Vide a letter dated 1 August 2007 the plaintiff was appointed as the project architect for the project by Limkokwing Integrated.

[7] The plaintiff had via a letter dated 4 June 2008 to the first defendant proposed a fee percentage and schedule of payment alongside their proposed obligations for the first defendant's consideration. There was no confirmation by the first defendant nor the second defendant and there was no formal contract with the detailed obligations and terms signed between the plaintiff and the second defendant. Under the Architects Act 1967 ('the Architects Act'), when a standard PAM Contract 2006 is entered into (in this case on 23 May 2008) the fee scale must be made known and mutually accepted before the works start. In this case, there was none.

[8] The plaintiff had thereafter vide letter dated 24 January 2007 appointed one Preserver Bina Sdn Bhd as building contractor for the project with the contract sum of RM9,259,377.39 who had thereafter proceed with the works

for the project. During the course of the works, certain drawings were signed by the second defendant as owner of the land.

[9] Based on the records of site minutes of meeting, the plaintiff represented by Ar Azim Aziz had attended only one meeting on 6 January 2009 throughout the contract tenure. The appointed M&E consultant, Connell Wagner, had left the site midway and so the plaintiff's site staff, Suhaimy Yusuff had also left midway through the project. As such, there was no qualified architect supervising the project.

[10] There were defect in the works carried on the project and despite the same, the plaintiff had granted an extension of time of 123 days which was not granted pursuant to cl 23 of the building contract as no application for extension of time was produced made under cl 23. This had effectively absolved the building contractor form paying liquidated and ascertained damages at the contractual rate of RM10,000 per day which would have amounted to RM1.23m. The defendants had disputed the contractor's works and the extension of time due to no supervision service and their claims and the matter had been referred to arbitration.

[11] During the course of the works, the plaintiff had issued progressive certificates of payment No 1–14 to the building contractor for works done. The last interim certificate of payment was No 14 which was dated 21 January 2009.

[12] The plaintiff had on issuing a certificate of practical completion for the project and had thereafter obtained a certificate of completion and compliance ('CCC') from Sepang Town Council.

[13] The plaintiff was paid an initial fee of RM200,000 for the commencement of the project mainly for building plan approval.

[14] The plaintiff had vide letter dated 5 February 2009 submitted a claim for the sum of RM535,080 based on the projected construction cost of RM7m. The second defendant had vide letter dated 15 June 2009 disputed the plaintiff's claim and requested the plaintiff to show the breakdown of the projected construction cost or RM7m. There was no response to the same.

[15] Being dissatisfied with the trial judge's decision, the defendants appealed, hence the appeal before me.

A THE APPEAL

[16] The gist of the appeal is premised on the ground that the trial judge erred in fact and in law in on the following issues:

B (a) the plaintiff had failed to discharge their burden of proof in proving that they were entitled to the sum of RM721,730.84 under the purported invoice dated 13 October 2009;

(b) the fees claimed by the plaintiff was calculated based on an estimated construction cost and not the final contract sum and was therefore excessive and inflated;

C

(c) the plaintiff had failed to show that the first defendant was in fact liable when there was no contractual relationship between the first defendant and the plaintiff as envisaged under the Architects Act; and

D

(d) the plaintiff had failed to show that there was a valid contract for architectural consultancy services that complied with the provisions of the Architects Act and Architect Rules 1996, in particular, the Architects (Scale of Minimum Fees) Rules 1986.

E LEGAL POSITION

[17] It is trite law that an appellate court will not readily interfere with the finding of facts arrived at by the trial court. A heavy burden is imposed on an F appellant who wishes to set aside a finding of fact of the trial judge (see *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] 1 MLJ 87).

[18] In *Johari bin Khalid & Anor v Mohamed Zamri bin Khalid & Anor* [1985] 1 MLJ 142, the Federal Court held as follows:

G

> We appreciate that this appeal is mainly involved with the finding of facts by the court below and as such we should be slow or reluctant to disturb the finding unless it could be shown that the finding cannot be sustained having regard to the evidence.

H **[19]** In *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517 Dzaiddin FCJ at p 526 held as follows:

> ... there is a clear authority also from the House of Lords — and followed by the Privy Council — which says that a distinction can be drawn between a finding of a I specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's finding of fact and form an independent opinion than in the case of the former. That authority is in the speech of Lord Reid in House of Lords' decision in *Benmax v Austin Motor Co Ltd*

[1955] 1 All ER 326 followed later by the Privy Council in the Singapore case of *Tay Keng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 at p 94. At p 329, His Lordship stated:

> *Wat (or Thomas) v Thomas* [1947] 1 ALL ER 582 was a consistorial case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more of the witnesses has been in dispute, and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thankerton. *But in cases where there is no question of credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as a good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion*. (Emphasis added.)

THE RESPONDENT'S SUBMISSIONS

[20] The plaintiff's submission in opposing this appeal are as follows:

(a) that the issues raised by the appellants in this appeal were not pleaded in their defence. What was pleaded were:

  (i) that the plaintiff's drawings were defective;

  (ii) that the plaintiff failed to comply with the Architects Act; and

  (iii) that the plaintiff is involved in the arbitration proceedings between the first defendant and the main contractor (Preserver Bina) and that the plaintiff's claim against the first defendant is included in Preserver Bina's claim against the first defendant;

(b) that the plaintiff never agreed to waive fees;

(c) that there is a valid contract between the plaintiff and the defendant appointing the plaintiff as the architect for the project;

(d) that the learned trial judge correctly found that the defendant's allegation of non-compliance of the Architects Act and the Architect Rules 1996 is an afterthought; and

(e) that the learned trial judge was correct in drawing the presumption of adverse inference against the first defendant.

COURT'S ANALYSIS

[21] Having perused the trial judge's grounds for decision, the submissions filed by both parties and the appeal record herein, there are a number of issues for me to consider in deciding the outcome of this appeal.

[22] In so far as grounds (a) and (b) are concerned, I shall deal with both these grounds simultaneously:

(a) the plaintiff had failed to discharge their burden of proof in proving that they were entitled to the sum of RM721,730.84 under the purported invoice dated 13 October 2009; and

(b) the fees claimed by the plaintiff was calculated based on an estimated construction cost and not the final contract sum and was therefore excessive and inflated;

[23] It is trite law that a plaintiff in a suit bears the burden of proving his claim. Such is the requirement under s 101 of the Evidence Act 1950 which states as follows:

> (1) Whoever desire any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> *Illustrations*
>
> (a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.
>
> A must prove that B has committed that crime.
>
> (b) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true.
>
> A must prove the existence of those facts.

[24] The burden for the plaintiff to prove his case does not shift on to the defendants (see *Selvaduray v Chinniah* [1939] 1 MLJ 253 (CA)).

[25] In so far as the standard of proof applicable it is based on a balance of probabilities.

[26] Looking at the statement of claim, I find that the plaintiff's claim for work fees is premised on the letter of appointment dated 1 August 2007 from Limkokwing Integrated to the plaintiff and the plaintiff's letter dated 4 June 2008 from the plaintiff to the first defendant in his capacity as President of Limkokwing University of Creative Technology.

[27] In the plaintiff's letter dated 4 June 2008 as mentioned above, the plaintiff submitted their job scope towards appointment as architect which included the plaintiff's scope of professional service and fees. At p 4 of this letter, the plaintiff wrote:

Basic Fee Proposal

Our overall fee proposal for the above works is based on 8% (Eight Percent) of *the total final construction cost* which shall be exclusive of five percent (5%) service tax.

[28] At para 4 of the statement of claim, the plaintiff alleged that the total amount payable for his services is RM921,730.84.

[29] At para 7 of the statement of claim, the plaintiff alleged that the defendants had paid a sum of RM200,000 (this fact is not disputed by the defendant) leaving a balance of RM721,730.84 owing and due by the defendants to the plaintiff (the defendants dispute the plaintiff's contention on the balance sum owing and due). The plaintiff further asserted that they will be relying on statement of accounts and invoices issued to the defendants at the trial.

[30] According to the plaintiff the certificate of fitness for occupation of the bungalow was issued on 11 February 2009.

[31] At the trial the plaintiff called only one witness — PW1. In so far as the invoices mentioned in the statement of claim is concerned, PW1 gave evidence as follows (see *penyata saksi plaintif* at p 4 of *Jld* 5 of the appeal record):

Soalan 8: Apakah yang Plaintif lakukan setelah Defendan-Defendan gagal, enggan dan/atau abai untuk membayar fi bagi perkhidmatan Plaintif tersebut?

Jawapan: Plantif telah menghantar invois-invois kepada Defendan-Defendan untuk mendapatkan bayaran bagi kerja yang telah dilakukan. Namun, tiada bayaran dibuat meskipun projek tersebut telah disiapkan.

Plaintif melalui surat peguamcara Plaintif bertarikh 4-9-2013 telah menuntut bayaran jumlah RM721,730.84 yang masih terhutang tersebut daripada Defendan-Defendan.

Namun begitu, Defendan-Defendan masih gagal, enggan dan/atau mengabaikan untuk membayar jumlah sebanyak RM721,730.84 tersebut.

Oleh itu, Plaintif memulakan tindakan ini terhadap Defendan.

[32] No reference was made to the invoices issued by the plaintiff by PW1. In fact, no documents substantiating the plaintiff's claim was referred to for purposes of showing the total final construction cost as spelled out in the plaintiff's letter dated 4 June 2008.

[33] During cross-examination of PW1, the invoice concerned was also not referred to by the defendant's counsel. However, towards the end of cross-examination, it was suggested to PW1 that as he had failed to comply with the legal provisions under the Architects Act, the plaintiff is not entitled to claim the balance fees as there was no valid contract recognised under the law

(see p 63 of the *rekod rayuan tambahan Jld* 7).

[34] Thereafter, re-examination of PW1 proceeded and the plaintiff closed its case.

[35] The question that arises at this juncture therefore is:

Did the plaintiff succeed in proving their case on the balance of probabilities?

[36] The claim of the plaintiff can be found at para 7 of the amended statement of claim:

7. Setakat ini, Defendan Pertama dan/atau Defendan Kedua telah membuat bayaran sebanyak RM200,000.00 dan baki hutang tertunggak yang masih belum dijelaskan adalah sebanyak RM721,730.84 kepada Plaintif. Plaintif akan merujuk kepada keseluruhan Penyata Akaun dan Invois-Invois yang dihantarserah oleh Plaintif kepada Defendan Pertama dan/atau Defendan Kedua secara terperinci pada hari perbicaraan kelak.

[37] The above allegation of the plaintiff was duly denied in para 12 of the defendant's amended statement of defence.

[38] Based on the facts stated above, I am of the view that the evidence adduced by the plaintiff to prove their claim of RM721,730.84 is lacking. My reasons for finding so are as follows:

(a) the invoices on which the plaintiff relied to prove their claim as stated in para 7 of the amended statement of claim was never referred to by the plaintiff through its sole witness ('PW1') at the trial. Having perused the statement of agreed facts (fakta-fakta yang dipersetujui) (see pp 30 and 31 *rekod rayuan bahagian* A), I find that the sending out of the invoice and the contents of the invoice was not a matter agreed upon by both parties. In so far as the amount of RM721,730.84 is concerned, the parties only agreed that the plaintiff had demanded payment for the same amount through their solicitors letter dated 4 September 2013 ('LOD' — see p 51 of *rekod rayuan bahagian* C). Having read the contents of the LOD, I find no mention of the invoice (see pp 34–38 of *rekod rayuan bahagian* C), which the plaintiff proposed to rely on as mentioned in the statement of claim;

(b) in view of the defendant's denial on the invoices (para 12 of the amended defence) and such was not a matter agreed upon by both parties, it is incumbent for the plaintiff to prove that the invoices were issued to the defendant. Without the invoices, the plaintiff's case is defective;

(c) similarly, the plaintiff must also adduce evidence that the amount in the invoice as well as that in the LOD is *the final construction sum* of the

works (as per the plaintiff's letter dated 4 June 2008). Regrettably, no evidence was adduced to support the plaintiff's claim despite the fact that the house has been completed and the certificate of fitness for occupation being issued; and

(d) without the invoices and evidence to support the plaintiff's claim of RM721,730.84, the plaintiff's case is flawed with major defects.

[39] Aware of the defects in their case at the trial in so far as the final construction cost is concerned, the plaintiff in their *hujahan tambahan responden* dated 5 August 2016, urged this court to consider the following evidence:

(a) the respondent's letter dated 3 February 2009 showing the sum of RM7,000,000;

(b) the interim payment certificate and valuation No 14 showing estimated value of work done as RM4,949,670.38;

(c) the final account prepared for Preserver Bina Sdn Bhd (the main contractor) as valued by the consultant quantity surveyor, FL Associates — showing the sum of RM5,534,117.04;

(d) the original contract sum of RM9,259,377.39;

(e) the plaintiff's invoice dated 13 October 2009; and

(f) other documents to show that apart from Preserver Bina, there were other contractors involved and thereby supporting the estimated construction cost of RM15,434,529.97 as stated in the plaintiff's invoice dated 13 October 2009.

[40] To my mind, the introduction of the above documents for purposes of substantiating the plaintiff's claim at this stage is not permissible. Not only does it prejudice the defendant, it also fails to shed light as to which of the documents reflects the final construction cost as spelled out in the plaintiff's own terms and conditions.

[41] As a matter of practice and law, the final account of a particular project is the best way to ascertain the final construction cost of the project. In the appeal before me there was no final account. No reasons for such was offered at the trial as the plaintiff was purely relying on their letter dated 4 June 2008 and the invoice (which was never adduced as evidence). Although counsel for the plaintiff did in the course of his oral submission on 5 September 2016 submit that the reasons for there being no final accounts ie the refusal of the first defendant to sign the same, such contention was never pleaded nor raised at the court below. My perusal of the final account (see pp 25–39 of the appellant's core bundle) further, finds that the so called final account was also not signed

by the plaintiff, quantity surveyor and the civil and structural and mechanical and electrical engineer. Hence, the first defendant whose signature is last in the list of signatories having to sign the final account cannot be faulted for not doing so.

[42] In so far as grounds (a) and (b) of the defendant's appeal is concerned, the plaintiff is of the view that the defendant did not contest the amount of RM721,730.84 as claimed by the plaintiff in para 7 of the amended SOC. I am not in agreement with the plaintiff's submission for the following reasons:

(a) the defendant did in para 12 of the amended defence to the amended writ dated 25 April 2014, denied the allegations contained in para 7 of the amended SOC; and

(b) it was the defendants contention that the plaintiff's letter of appointment dated 4 June 2008 had no legal effect as it contravened the provisions of the Architects (Scale of Minimum Fees) Rule 2010 (see para 7 of the amended defence).

[43] Although the plaintiff did during the defendant's case referred to the invoice dated 13 October 2009 (pp 34–38 of *rekod rayuan bahagian* C), I can only reiterate what I have stated in paras 25 and 26 above. The burden of proving a claim does not shift if the party asserting fails to prove his claim as there is nothing for the defending party to disprove. Equally, 'the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it: for a negative is usually incapable of proof ... ' (see *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145).

[44] Having said the above, I am of the view that on this ground alone the defendant's appeal should be allowed without having to decide on the other grounds of appeal as put forward by the defendant and the submissions by the plaintiff on those grounds.

[45] The defendant's appeal is hereby allowed with costs.

Appeal allowed with costs.

Reported by Dzulqarnain Ab Fatar